

FILED BY CLERK

JAN 27 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

REA CONSTRUCTION, INC.,)	
an Arizona corporation,)	2 CA-CV 2011-0110
)	DEPARTMENT A
Plaintiff/Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
J.W. FUNERAL SERVICES, L.L.C., an)	Appellate Procedure
Arizona limited liability company,)	
)	
Defendant/Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200401032

Honorable Peter J. Cahill, Judge

Affirmed

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B R A M M E R, Judge.

¶1 REA Construction, Inc. (REA) appeals from the trial court’s award of costs and attorney fees to J.W. Funeral Services, L.L.C. (JWFS). REA argues the trial court erred in determining JWFS was the prevailing party. We affirm.

Factual and Procedural Background

¶2 “We view the facts in the light most favorable to upholding the trial court’s ruling.” *Hammoudeh v. Jada*, 222 Ariz. 570, ¶ 2, 218 P.3d 1027, 1028 (App. 2009). REA and JWFS entered into a contract for REA to construct a mortuary and chapel for JWFS. A dispute arose over invoices for the project and REA sued JWFS; JWFS counterclaimed, alleging defective workmanship. After a bench trial, the court determined JWFS owed REA for some or all of the amounts claimed in most of the disputed invoices and determined REA was responsible for some faulty construction. The court determined JWFS was the prevailing party and awarded it seventy-five percent of its requested attorney fees pursuant to a provision of the contract that stated “[i]n the event [the] Agreement must be enforced by either party the prevailing party therein shall be entitled to recover reasonable attorneys fees in addition to court costs and expenses.” REA appealed from the portion of the judgment entered against it.

¶3 On appeal, we affirmed the trial court’s denial of REA’s motion for a new trial. But, we determined the court had incorrectly calculated interest due REA and remanded. We also concluded some of the factors the court had relied on in determining which party prevailed were improper. Because it was unclear how much weight the court

had given the inappropriate factors, we vacated the award of attorney fees and instructed the court to reconsider the award.

¶4 On remand, REA submitted a new request for attorney fees. The trial court considered REA's request and JWFS's response and determined that "[n]o change to the prior decision [was] warranted." The court entered final judgment awarding REA damages of \$56,056.48 plus interest, and awarding JWFS damages of \$18,096.33 and attorney fees and costs. This appeal followed.

Discussion

¶5 REA argues the trial court erred by reaffirming its determination that JWFS was the prevailing party and awarding JWFS attorney fees and costs. REA contends it is the prevailing party "under any reasonable interpretation of the contract," and that it had a greater percentage of success than JWFS.

¶6 REA asks us to review the trial court's award of attorney fees de novo as an issue of contract interpretation. It asserts the determination of which party prevailed within the meaning of the contract is a question of law, suggesting we may substitute our judgment for that of the trial court.¹ We agree contract interpretation is an issue of law reviewed de novo. *See Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, ¶ 9, 218 P.3d 1045, 1050 (App. 2009). But, we determined in our prior memorandum decision that, because the contract does not define "prevailing party," we would rely on "caselaw addressing the definition of the term 'successful party' in A.R.S. §§ 12-341 and

¹REA has not cited any authority where an appellate court reviewed de novo a trial court's determination of which party prevailed.

12-341.01.” *REA Constr., Inc. v. J.W. Funeral Servs., L.L.C.*, No. 2 CA-CV 2010-0026, ¶ 12 (memorandum decision filed Aug. 17, 2010). And we noted the trial court, in applying those statutes, has discretion to determine the successful party, rejecting as a matter of law REA’s claim that it was the prevailing party. *Id.* ¶¶ 12, 15. In general, “once an appellate court has decided a legal issue, that decision is the law of that case . . . and the decision will not be reconsidered in a second appeal, provided the facts, issues and evidence are substantially the same.” *Lennar Corp. v. Transamerica Ins. Co.*, 227 Ariz. 238, ¶ 12, 256 P.3d 635, 639-40 (App. 2011).

¶7 REA, as an additional part of our review, also asks us to apply a percentage of success test, adding to its damages award both the amount of interest it was awarded and a pre-trial payment JWFS had paid it, to determine which party prevailed. The percentage of success and totality-of-the-circumstances tests both can be appropriate, *see Schwartz v. Farmers Ins. Co. of Ariz.*, 166 Ariz. 33, 38, 800 P.2d 20, 25 (App. 1990), but we determined previously the trial court did not err in applying a totality-of-the-circumstances test here. *REA Constr., Inc.*, No. 2 CA-CV 2010-0026, ¶ 12; *see also Lennar Corp.*, 227 Ariz. 238, ¶ 12, 256 P.3d at 639-40.

¶8 Therefore, the only issue properly before us is the trial court’s reconsideration of attorney fees on remand. We review for an abuse of discretion and will affirm the court’s determination of which party prevailed if there is any reasonable basis for it. *See Kaman Aerospace Corp. v. Ariz. Bd. of Regents*, 217 Ariz. 148, ¶ 35, 171 P.3d 599, 608 (App. 2007). We defer to the trial court because it is “better able to evaluate the parties’ positions during the litigation and to determine which has

prevailed.” *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, ¶ 22, 261 P.3d 784, 788 (App. 2011). REA contends that, even under an abuse of discretion standard, the attorney fee award must be set aside because there is no reasonable basis in the record to sustain it.

¶9 On remand, the trial court did not specify the ground for its determination that JWFS was the prevailing party regardless of the factors it erroneously had previously considered. But “we may deem any necessary findings to be implied in the court’s judgment,” *McMurray v. Dream Catcher USA, Inc.*, 220 Ariz. 71, ¶ 6, 202 P.3d 536, 539 (App. 2009), so long as they are “reasonably supported by the evidence,” *John C. Lincoln Hosp. & Health Corp. v. Maricopa Cnty.*, 208 Ariz. 532, ¶ 23, 96 P.3d 530, 538 (App. 2004). For the reasons that follow, we find a reasonable basis in the record for the court’s determination that JWFS was the prevailing party. *See Kaman Aerospace Corp.*, 217 Ariz. 148, ¶ 35, 171 P.3d at 608.

¶10 In its original complaint, REA asserted JWFS owed it \$114,146.08. At trial, however, REA conceded it was entitled only to \$88,000. The trial court ultimately awarded REA \$56,056.48 in damages plus interest. JWFS asserted it was owed \$28,804.80 on its counterclaim, and the court awarded it \$18,096.33, noting JWFS had prevailed on its position that it did not owe the various amounts REA had demanded throughout the litigation. And, as we stated previously, the court relied properly on both its finding that REA had inflated its claims and the relative success of the parties in light of the relief each had sought. *REA Constr., Inc.*, No. 2 CA-CV 2010-0026, ¶ 14. Consequently, although both parties were only partially successful, there is support in the record for the court’s determination that JWFS was the prevailing party and thus it did

not abuse its discretion in awarding JWFS attorney fees and costs. *See Berry*, 228 Ariz. 9, ¶ 24, 261 P.3d at 789 (partial success does not preclude party from prevailing); *see also Hilgeman v. Am. Mortg. Sec., Inc.*, 196 Ariz. 215, ¶ 7, 994 P.2d 1030, 1033 (App. 2000) (reviewing court will not substitute its judgment for trial court determinations warranting deference).

Disposition

¶11 For the foregoing reasons, we affirm the trial court's award of costs and fees. JWFS requests an award of attorney fees on appeal pursuant to its contract with REA. We grant JWFS reasonable attorney fees and costs upon its compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge